Supreme Court, U. S.
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In the Supreme Court of the United States

No. 79-1984

COMMONWEALTH OF PENNSYLVANIA

vs.

WILLIAM MICHAEL STRUBE
Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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OPINIONS BY LOWER COURTS

1. March 31, 1978: Opinion of Walter, J., for the Court of Common Pleas of Lancaster County, Pennsylvania, specially presiding, holding that 18 P.S. Section 3104 is not unconstitutional on Fifth and Fourteenth Amendment grounds. This decision has not been reported, but a copy of the written opinion is contained in the Appendix p. 16a, infra.

2. December 28, 1979: Opinion of the Superior Court of Pennsylvania, as yet unreported (Slip Opinion J-150, 1979), Pa. Superior Ct. , A.2d (1979), majority opinion by Price, J., affirming the petitioner's convictions over constitutional challenge; concurring opinion of Spaeth, J., attached. See Appendix p. 32a and 54a, infra, respectively.

3. March 18, 1980: Letter from Deputy Prothonotary of Supreme Court of Pennsylvania advising defense counsel that Court had entered its order denying allowance of appeal (this order is not reported). See Appendix p. 58a, infra.

JURISDICTION

The Pennsylvania Supreme Court on March 18, 1980, in an unreported order (Appendix p. 58a, infra) denied Petitioner's petition for allowance of appeal from the decision of the Pennsylvania Superior Court (Pennsylvania's intermediate level appellate court). Hence, the highest and final appellate court of the Commonwealth of Pennsylvania has refused, discretionarily, to review the decision of the Superior Court of Pennsylvania dated December 28, 1979 (Appendix p. 32a infra), which had decided a federal question of substance not theretofore determined by the United States Supreme Court, in a way probably not in accord with *Wardius vs. Oregon,* 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed. 2d 82 (1973), and *Brooks vs. Tennessee,* 406 U.S. 605, 92 S.Ct. 1891, 32 L.Ed. 2d 358 (1972).

Title 28 of the United States Code, Section 1257 (3), confers jurisdiction on this Honorable Court when the highest court of a state renders a final judgment where the validity of a state statute is drawn in question on the ground of its alleged repugnance to the Constitution of the United States. In this situation, Petitioner seeks a writ of certiorari to the Pennsylvania Superior Court.

The instant case involves the invocation of the Fifth Amendment of the U.S. Constitution (self-incrimination and due process of law) and likewise, the Fourteenth Amendment (making the Fifth Amendment applicable to the several states).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Quoted verbatim below is the Pennsylvania statute challenged unsuccessfully in this case on federal constitutional grounds in the Superior Court:

> [18 Pa. C.S.] Section 3104 Evidence of victim's sexual conduct
>
> (a) General rule. —Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter *except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.* [Emphasis added.]
>
> (b) Evidentiary proceedings. —A defendant who proposes to offer evidence of the alleged victim's past sexual conduct pursuant to subsection (a) shall file a written motion and offer of proof at the time of trial. If, at the time of trial, the court determines that the motion and offer of proof are sufficient on their faces, the court shall order an in-camera hearing and shall make findings on the record as to the relevance and admissibility of the proposed evidence pursuant to the standards set forth in subsection (a).
>
> As amended 1976, May 18, P.L. 120, No. 53, Section 1, effective in 30 days.

Constitutional and Statutory Provisions Involved

2. Amendment V, United States Constitution:

> No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, . . .
>
> U.S.C.S.—Constitution—Amendments 5-end, p. 1.

3. Amendment XIV, Section 1, United States Constitution:

> . . . nor shall any state deprive any person of life, liberty or property, without due process of law; . . .
>
> U.S.C.S.—Constitution—Amendments 5-end, p. 444.

QUESTION PRESENTED FOR REVIEW

I. Is the rape shield law of Pennsylvania, 18 Pa. C.S. Section 3104 (b), unconstitutional under the Fifth and Fourteenth Amendments, in that it forces the Defendant to make an offer of proof and testify pretrial in the presence of the District Attorney concerning the proposed introduction of evidence of the alleged victim's prior consensual sexual conduct with the Defendant?

STATEMENT OF THE CASE

Petitioner William Michael Strube was charged by the Pennsylvania State Police with the crimes of rape, 18 Pa. C.S. Section 3121 (1) and simple assault, 18 Pa. C.S. Section 2701 (a) (1), arising out of an incident which occurred in Columbia, Pennsylvania, on May 8, 1976.

Trial counsel on March 21, 1977 filed immediately prior to trial in the Lancaster County Court of Common Pleas, a motion and offer of proof pursuant to 18 Pa. C.S. Section 3104 (b), (respecting proposed trial testimony by the Defendant as to prior sexual relations between him and the prosecutrix) over his objection that forcing him to file such a motion violated his constitutional right to due process of law, and his other Fifth Amendment rights (see Appendix pp. 1a-2a, infra). After an in-camera proceeding at which the Defendant testified in the presence of the judge and the Assistant District Attorney, Judge John A. Walter of the Lancaster County Court of Common Pleas ruled that 18 Pa. C.S. Section 3104 was constitutional, and that Mr. Strube could testify at trial, if he so chose, as to his having had prior sexual relations with the prosecutrix, less than one (1) year prior to the May, 1976 incident. Judge Walter also ruled, however, over objection by defense counsel, that the Assistant District Attorney could be present at the pretrial in-camera proceeding, and would not be ordered not to discuss the in-camera testimony with the prosecutrix or any other Commonwealth witness (see Appendix pp. 8a-10a, infra).

After the defense had rested its case at trial, the prosecutrix was permitted to testify in rebuttal on the issue of prior consensual sexual relations, again over defense counsel's objection (Appendix pp. 11a-12a, infra). The case was tried before Judge Walter and a jury between March 21 and March 23, 1977, and on the latter date, after more than seven hours of deliberation, the jury returned verdicts of guilty on both the charges of rape and of simple assault.[1]

On March 29, 1977, trial counsel filed various motions in arrest of judgment and for a new trial which alleged, inter alia, that the court had erred in refusing to find 18 Pa. C.S. Section 3104 unconstitutional on Fifth and Fourteenth Amendment grounds (see Appendix p. 14a, infra).

Judge Walter, on behalf of the Lancaster County Court of Common Pleas, wrote an opinion dated March 31, 1978, in which he denied all of the Defendant's post-trial motions, specifically holding that the statute in question was not unconstitutional (Appendix p. 32a 15a, 24a-27a, infra).

At sentencing on July 24, 1978, Petitioner was sentenced to a term of not less than fifteen (15) months to not more than four (4) years in the Lancaster County Prison on the charge of rape, and concurrently, to a term of six to twenty-three (6-23) months on the charge of

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[1] At trial, only the prosecutrix testified directly as to the circumstances of the alleged rape (that is, as part of the Commonwealth's case). The Defendant admitted that he had had sexual intercourse with her, but testified that she had more than consented to it, and in fact, had gone out of her way to lead him on. This was verified by two other defense witnesses.

simple assault. That same day, July 24, 1978, Mr. Strube filed his notice of appeal to the Superior Court of Pennsylvania. On December 28, 1979, a three-judge panel of the Superior Court, in an opinion by Judge Price (see Appendix p. 32a, infra), affirmed the judgment of the Common Pleas Court upholding the constitutionality of 18 Pa. C.S. Section 3104. Judge Lipez joined the majority opinion, but Judge Spaeth concurred in the result only, expressing reservations as to the potential for prosecutorial abuse of the rape shield law (see Appendix p. 54a, infra). The Superior Court decision, *Commonwealth vs. William Michael Strube,* Pa. Superior Ct. , A.2d (1979), has not been reported at the date of this writing.

In an unreported order, the Pennsylvania Supreme Court denied Petitioner's petition for allowance of appeal on March 18, 1980 (see Appendix p. 58a, infra).

ARGUMENT

The Superior Court opinion below represents the first Appellate decision in Pennsylvania to construe the rape shield statute; *Commonwealth vs. William Michael Strube,* Pa. Superior Ct. , A.2d (December 28, 1979) (Slip Opinion). Petitioner's counsel does not believe that the Supreme Court of the United States has ever addressed the due process issues raised in this petition, relating to the constitutional challenge of a state's rape shield law.

The issue in the instant case is whether the Commonwealth of Pennsylvania, consistent with the due process clauses of the Fifth and Fourteenth Amendments, may require a defendant accused of rape to disclose, immediately prior to trial at an in-camera proceeding, with the District Attorney in attendance, that he intends to testify that *he and the prosecutrix* had previously engaged in consensual sex; see 18 Pa. C.S. Section 3104(b). In the Petitioner's view this sort of evidence is not comparable to evidence generally of a prosecutrix' reputation for unchastity, which is of course properly proscribed by 18 Pa. C.S. Section 3104.[2] The statute does not require reciprocity on part of the Commonwealth, by way of disclosure of witnesses

[2] In two cases cited by the Superior Court in support of its holding, *People vs. Blackburn,* 56 Cal. App. 3d 685, 128 Cal. Rptr. 864 (1975) and *State vs. Blum,* 17 Wash. App. 37, 561 P.2d 226 (1977), the rape shield statutes construed on those occasions both specifically *excluded* evidence of prior sexual relations between prosecutrix and defendant from the procedural restrictions of those

it intends to call to rebut the proposed defense testimony, as would appear to be required by *Wardius vs. Oregon,* 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed. 2d 82 (1973). In this case, the Defendant was forced to testify at a much earlier time than he or his counsel would have chosen, at an in-chambers proceeding in the presence of the District Attorney on the first day of a three-day trial. Hence, Petitioner submits additionally that the statute provided for an unconsitutional interference with the guiding hand of counsel; *Brooks vs. Tennessee,* 406 U.S. 605, 32 L.Ed. 2d 358, 92 S.Ct. 1891 (1972). Since the trial in this case lasted three days, the prosecutrix was afforded at least an extra day to compose herself before taking the stand in rebuttal of the Defendant's testimony, over objection of defense counsel. Compliance with the statute in this case[3] enabled the District Attorney to prepare the prosecutrix for rebuttal, as well as to have additional time to prepare cross-examination of the Defendant himself on the point. Had the Defendant *not* been required to disclose this proposed element of his case, perhaps the

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state laws. Both cases involved rejected offers of proof of prior relations between the prosecutrix and third parties, and not the defendant himself.

[3] Defense counsel was entitled to take the legislature at its word, and to assume the judge and the District Attorney were aware of the statute's restrictions. Hence, it can not be argued that the Defendant waived any right to challenge the statute by complying with its terms. The Defendant would not have been required to ignore the statute and to attempt to testify (without filing the pretrial motion) as to the prior consensual sexual encounter under the risk that he might later have been prevented from doing so at trial; see e.g. *New Jersey vs. Portash,* 440 U.S. 450, 99 S. Ct. 1292, 59 L.Ed. 2d 501 (1979).

prosecutrix would have been shocked with the naked truth, and might have refused to take the stand in rebuttal, notwithstanding the anticipated urgings of the District Attorney. Perhaps the prosecutrix had not previously *told* the District Attorney about the prior consensual sexual encounter. At any rate, since the error was of constitutional dimension, it must have been harmless beyond a reasonable doubt in order not to constitute reversible error; *Chapman vs. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967).

The primary thrust of this petition is that (1) there is no necessity, and no rational basis, for the very existence of Section 3104 (b); (2) the statute is quite obviously devoid of the reciprocity requirement envisioned by *Wardius vs. Oregon,* supra; and (3) the statute results in impermissible restrictions on the Defendant's Fifth and Fourteenth Amendment rights (a) to remain silent, and (b) to choose whether or not, and when, to introduce evidence of prior consensual sex with the prosecutrix, *Brooks vs. Tennessee,* supra, and *Williams vs. Florida,* 399 U.S. 78, 26 L.Ed. 2d 446, 90 S.Ct. 1983 (1970) (dissenting opinion of Justice Black). We address these arguments seriatim as follows:

(1) There is no rationally defensible need as a matter of public policy to protect an alleged rape victim from the testimony of the Defendant, that he himself had, on an earlier occasion or occasions, had consensual sexual relations with her.[4] This is particularly so when comparison is made between the risk to the defendant in a

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[4] Judge Spaeth, concurring in the Pennsylvania Superior Court opinion, said that the purpose, generally, of Section 3104 ". . . is to avoid confusion of issues at trial and needless embarrassment

rape case, who faces a potential twenty-year prison term, and the benefit to the Commonwealth, theoretically derived from "protecting" an embarrassed prosecutrix via 18 Pa. C.S. Section 3104 (b). It should hardly come as a surprise to the prosecution in a rape case that consent is likely to be raised as a defense issue. It would hardly seem to be an undue burden on the Commonwealth, or unduly traumatizing to the prosecutrix, to be on the alert for such proposed testimony during the course of the trial itself. If the defense testimony is a last-minute fabrication, surely the District Attorney's cross-examination should be an effective counter.[5] In any event, the *Wardius* requirement of a "strong showing to the contrary" by a state which seeks to enforce a "one-way" discovery mechanism is hardly demonstrated by the Pennsylvania statute in question

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of the prosecutrix by excluding irrelevant (or at best, marginally relevant) evidence concerning the prosecutrix's prior sexual behavior." Slip Opinion, p. 2 (Appendix p. 55a, infra). In the present case, the evidence offered was patently relevant, and was hardly a "needless" embarrassment of the prosecutrix. Petitioner's argument here is that such evidence may nearly *never* be irrelevant or needlessly embarrassing, because it tends to show that consent was more likely given on the latter occasion.

[5] The Superior Court majority apparently does not take issue with the position that embarrassment of the witness is hardly of the same magnitude as the harm to the accused if he is wrongly convicted at trial. (Slip Opinion p. 8, Appendix p. 41a, infra). However, the majority nevertheless erroneously analogizes the Section 3104 procedure to an ordinary motion in limine, where anticipated evidentiary disputes are resolved out of the jury's hearing. This reasoning totally misses the point that the Section 3104 "motion in limine" is one which is forced upon the defense, and not one in which the defense voluntarily makes the decision to file such a motion.

here; *Wardius vs. Oregon,* supra, 412 U.S. at p. 475. If there is no rational basis for Section 3104, there is certainly no "strong showing" for the necessity of the statute.

(2) The statute should be held unconstitutional because, whether it is intended to be a discovery mechanism or not, it is a non-reciprocal device which allows the Commonwealth a preview of the defense (consent) which, if believed by the jury, constitutes a "complete" defense to the charge of rape; *Wardius vs. Oregon,* supra, and *Commonwealth vs. Contakos,* 455 Pa. 136, 314 A.2d 259 (1974). Both the Lancaster County Court of Common Pleas and the majority of the Superior Court panel (see slip opinion of the Superior Court, page 11, Appendix p. 44a, infra) found the instant case to be distinguishable from *Wardius* for the reason, inter alia, that *Wardius* involved the "complete" defense of alibi whereas this case did not. Neither the Petitioner nor Judge Spaeth, in his concurring opinion below, were persuaded by this rationale. If the defense of consent is believed, the jury must find the Defendant not guilty. Furthermore, the Superior Court majority *admitted* that the statute is a "one-way street" (slip opinion, page 13, Appendix pp. 46a-47a, infra) but suggested that there is no prejudice to the Defendant because the prosecution has no "lead time" to act on the information it might gain as a result of the mandated pretrial hearing. However, what is to prevent the Commonwealth from requesting a continuance to do a bit of further investigation as a result of what it learns at the pretrial hearing? Even if the Commonwealth does not seek a continuance, in every trial that lasts more than one day, the State with all its conceded resources and advantages will have plenty of time to produce rebuttal testimony. If

there is any imbalance in the rights of pretrial discovery, it should work in the Defendant's favor; *Wardius vs. Oregon,* supra.

In response to the *Wardius* analogy, the Pennsylvania Superior Court majority raised a straw man in its suggestion at page 13 of the Slip Opinion (Appendix p. 47a, infra) that the prosecution would be required to divulge ". . . its entire case while receiving precious little in return." The only information that the Commonwealth would be required to disclose, under the argument presented by this case, would be the names and addresses of witnesses who could rebut the Defendant's allegation that he and the prosecutrix had engaged previously in consensual sexual relations. How this would require the prosecution to display its "entire case" is impossible to comprehend.[6] The Superior Court further erroneously suggested that the "pivotal" point of the *Wardius* decision was the forced and unreciprocated disclosure of the defendant's "complete defense" of alibi. The "pivotal" point was in fact the lack of reciprocity; the *Wardius* decision did not turn upon the "completeness" of the defense.

(3) The Petitioner urges this Court to hold for federal (Fifth and Fourteenth Amendments) constitutional purposes that 18 Pa. C.S. Section 3104(b) exercises an impermissibly chilling effect on what should be the Defendant's unfettered decision to take the stand or not to

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[6] The attention of the Court is drawn to the concurring opinion of Judge Spaeth in the Superior Court, in which he readily hypothesized reciprocity problems arising from the operation of Section 3104(b) (See Slip Opinion of Spaeth J. pp. 2-3, Appendix pp. 54a-56a, infra).

take the stand; e.g. *Griffin vs. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed. 2d 106 (1965); *Williams vs. Florida,* supra, (dissenting opinion of Justice Black). The Petitioner further urges this Court to find that the statute imposes an impermissible restriction on the "guiding hand" of defense counsel, which is a violation of the Fifth and Fourteenth Amendment due process clauses; *Brooks vs. Tennessee,* 406 U.S. 605, 92 S.Ct. 1891, 32 L.Ed. 2d 358 (1972). In *Brooks vs. Tennessee,* this Court held a Tennessee statute unconstitutional for its requirement that a criminal defendant, if he was to testify at all at his trial, was required to testify as his own first witness. The only difference between this case and *Brooks* was that here the Defendant was forced to accelerate his testimony in front of the judge and the District Attorney, rather than in front of the jury. See also *Ferguson vs. Georgia,* 365 U.S. 570, 5 L.Ed. 2d 783, 81 S.Ct. 756 (1961) (Georgia statute held violative of Fifth and Fourteenth Amendment due process clauses, in preventing defense counsel from aiding the accused in eliciting an unsworn statement from the defendant before the court and jury, even when the statement itself was not to be considered "evidence"); see also *Powell vs. Alabama,* 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1931) (deprivation of the guiding hand of counsel at every step in a criminal proceeding constitutes an infringement of the due process clause).

Should the Defendant file the motion required by Section 3104 prior to trial, and later choose to abandon the consent defense during the trial, there is nothing to prevent the Commonwealth from cross-examining him on the abandonment of the defense (presuming the Defendant chooses to testify), and later commenting on summation

that an unfavorable inference could be drawn against the accused as a result of the abandonment of the defense. Furthermore, unlike the situation in *Williams vs. Florida,* where only written pretrial notice of alibi was involved, Section 3104 not only requires the written motion and offer of proof, it requires an in-camera evidentiary hearing at which the District Attorney gets an advance crack at cross-examining the Defendant as to a vital element of his defense. Hence, *Williams vs. Florida* may be distinguished for two reasons: (1) Florida's Notice of Alibi Rule in that case provided for reciprocity for the defense, and (2) the Rule involved only a written pretrial disclosure of names and addresses of alibi witnesses. For these reasons, the Court found the procedure to be nothing more than an accelerated disclosure of information which the Defendant planned from the beginning to divulge at trial. Here, there is much more than a mere notice of alibi—there is an actual hearing where the Defendant must testify under oath and be cross-examined, or else risk the loss of his ability to present evidence of prior consent of the prosecutrix. In the words of Justice Black dissenting in *Williams vs. Flordia:*

> The Defendant, under our Constitution need not do anything at all to defend himself, and certainly. he cannot be required to help convict himself. Rather, he has an absolute unqualified right to compel the State to investigate its own case, find its own witnesses, prove its own facts, and convince the jury through its own resources. Throughout the process, the Defendant has the fundamental right to remain silent, in effect, challenging the State at every point to: 'Prove it.!'
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> 399 U.S. at p. 112, 26 L.Ed. 2d at p. 483.

CONCLUSION

Petitioner respectfully asks Your Honorable Court to issue a writ of certiorari to the Superior Court of Pennsylvania, and to consider the constitutionality of the Pennsylvania rape shield law.

Respectfully submitted,

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APPENDIX

IN THE COURT OF COMMON PLEAS OF
LANCASTER COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

No. 1230 of 1976

COMMONWEALTH OF PENNSYLVANIA

vs.

WILLIAM MICHAEL STRUBE

MOTION AND OFFER OF PROOF

Pursuant to Section 3104(b) of Act No. 53 of 1976, 18 P.S. 3104, the Defendant hereto files the following written Motion and Offer of Proof:

1. The Defendant offers to introduce evidence of the alleged victim's past sexual conduct with the Defendant, consent of the alleged victim being at issue, by offering testimony concerning past act of sexual intercourse between the alleged victim, Pamela K. Fisher, and the Defendant.

2. This Motion and Offer of Proof is being filed over objection of Defendant to the procedure set forth in Section 3104 of the Pennsylvania Crimes Code as denying

the Defendant his constitutional right to due process of law, his Fifth Amendment rights, and his right to confront his accusors. Defendant reserves the right to challenge the constitutionality of the said statute requiring him to file this written Motion and Offer of Proof at the time of trial.

Geisenberger, Zimmerman,
Pfannebecker & Gibbel
By: (s) Richard P. Nuffort
Richard P. Nuffort
Attorney for Defendant

* * * * * * * *

(5) PROCEEDINGS

(Whereupon, on Monday, March 21, 1977, at 2:10 o'clock p.m. in Chambers, the following proceedings transpired:)

MR. NUFFORT: This is a somewhat unusual situation. It's the first case that I have seen arise under the new Act, your Honor.

The Crimes Code was amended to provide that in any action and prosecution under the section of sexual offenses evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the Defendant where consent of the alleged victim is at issue, and such evidence is otherwise admissible pursuant to the rules of evidence.

Section "B" provides that the Defendant who proposes to offer evidence of the alleged victim's past sexual conduct pursuant to subsection "A" shall file a written motion and offer of (6) proof at the time of trial, and then there is provision for an in camera hearing.

Our position in this matter, your Honor, is that this statute, this section supposed to be Section B is unconstitutional analogous to the old rule requiring the Defendant to give notice of his alibi defense, and if the Defendant in this case chose to introduce evidence of the victim's past

sexual conduct with the Defendant, I feel that we should be entitled to introduce that evidence at the time of trial and during the course of the trial and assuming that it is otherwise admissible pursuant to the rules of evidence it should be admitted, and I should not be forced to file my motion or offer of proof in writing prior to the time of trial, and I am talking about specifically now with reference to the conduct of the victim with the Defendant. I'm not talking about her reputation. I'm just talking about her conduct with the Defendant.

So my request is that the Court recognize that this provision is unconstitutional and that we just proceed with the trial as we ordinarily do, and then the Defendant, if he so chose, could introduce evidence of her conduct with him at the (7) appropriate time.

THE COURT: Mrs. Herr?

MRS. HERR: Your Honor, I cannot see the analogy between the defense of alibi and this particular defense that Mr. Nuffort is presenting to the Court in that the alibi defense, you're suggesting that that would give the Commonwealth an opportunity to prepare to prove that the Defendant was in fact not where he was saying he was going to be at that time.

Here I don't see the analogy between the alibi defense and this particular defense, and since the Legislature has ruled that this may not be introduced without such preparation I suggest that this is not the proper time for you to attack this.

MR. NUFFORT: One thing I didn't mention. I said it was analogous to the old alibi rule. I think it also violates his Fifth Amendment Rights. He would be forced

to testify prior to the time of the trial. I think it's essentially pretrial proceeding, and I think it violates his right to confront witnesses.

He must give the Commonwealth (8) notice of what testimony he is going to seek to elicit from a particular witness. It violates his Sixth Amendment Rights as well as his Fourth Amendment due process rights and his Fifth Amendment Right against self-incrimination or his right to remain silent.

It's also the possibility, as the trial progresses, the Defendant would choose not to take the stand.

THE COURT: Well, your motion is respectfully denied. I will follow the dictates of the statute, and if you care to take the matter up on appeal we will let the Supreme Court decide the issue, the Superior Court decide the issue, but I cannot at this juncture without more evidence find as a matter of law that that section of the Act is unconstitutional, particularly in view of the evils which the Act has been created to correct.

MR. NUFFORT: Okay, then I have my written motion and offer of proof then to present, and I have included in the motion, itself, that I am presenting it over objection, having already made my oral motion asking that the Statute be declared (9) unconstitutional or not followed in this case, and then I have a written motion under Section B alleging that there was prior conduct between this victim and the Defendant.

I know from the way it was typed it says, ". . . offering testimony concerning past acts."

I think it should be "Act." I think it was one prior incident, not several.

And frankly, your Honor, I looked at the Statute. It said you shall file written motions and offer of proof at the time of trial. If, at the time of trial, the Court determines that the motion and offer of proof are sufficient on their faces, the Court shall order an in camera hearing and shall make findings on the record as to the relevance and admissibility of the proposed evidence pursuant to the standards set forth in subsection "A."

I presume that's what we have to do now.

MRS. HERR: And you are saying this should be amended to read "Act," past act?

MR. NUFFORT: Right.

(10) THE COURT: Why don't you just cross that out? Cross out the "S."

MR. NUFFORT: The "S."

Now, the question, of course, your Honor, is what is an in camera hearing. My next motion is that the hearing be conducted in the presence of you, the Court Reporter, myself, and the Defendant only.

THE COURT: I think that's proper.

MR. NUFFORT: Any objections?

MRS. HERR: I can't think of one right offhand.

THE COURT: We're dealing only with the relevancy of the evidence anyway, and that's the question that I must direct myself to. I think it's a proper request.

MR. NUFFORT: Would you like to do it in here then?

THE COURT: Yes, that's all right.

MR. NUFFORT: Those are the only (11) pre-trial matters I have to be covered at this time.

I have one other request, but I think we should take care of this first. There are no other requests that I would have of the Court.

If Mrs. Herr would care to leave?

MRS. HERR: Oh, I'm not even allowed to stay here?

MR. NUFFORT: That's what I said: His Honor, the Court Reporter, myself, and the Defendant.

THE COURT: I'm sorry, I didn't interpret it that way.

MR. NUFFORT: I thought I made the motion clear.

MRS. HERR: I thought he meant to exclude the victim and the prosecuting officer.

MR. NUFFORT: No, my motion was to have it completely and strictly in the presence of the Court Reporter, the Court, and myself.

THE COURT: Go ahead, speak to it.

(12) MRS. HERR: Your Honor, I'm the prosecuting attorney in this instance. Anything that goes on the record, I should be present.

At anytime the Defendant has the right to be here, and so does the Commonwealth. The Commonwealth is bringing this prosecution. I can't conceive of the motion to begin with asking that the Commonwealth's attorney be excluded from an in camera hearing with the Court on a matter which the Commonwealth certainly does have an interest in.

In-Chambers Pre-Trial Proceeding

THE COURT: I agree.

MRS. HERR: Thank you.

THE COURT: We will exclude the prosecuting witness and the prosecuting officer, but we will not exclude the District Attorney from the in camera hearing.

MR. NUFFORT: Is that combined then with a direction to the prosecuting attorney that what is discussed at the in camera hearing cannot be discussed with the prosecutor and the alleged victim?

(13) THE COURT: It would not be a matter that is brought before the Jury so it would be handled just as a suppression hearing. The substance would be handled, and that is that it would not be the subject matter of argument to the Jury because they would not have heard whatever goes on in here in the event that the Defendant made the decision not to pursue this line of defense.

MRS. HERR: Oh, I understand that, your Honor. Certainly I would not be allowed to mention that in my summation.

I think that Mr. Nuffort is requesting that in fact anything that's brought out in this in camera hearing, I couldn't question my victim about that particular incident.

MR. NUFFORT: That's what I am asking.

MRS. HERR: And I certainly don't see any reason why I could not question my victim about that particular incident. If that comes out would I be restricted under those conditions? I can't conceive that I can be or what grounds you would have (14) to keep me from it.

MR. NUFFORT: The purpose is tying back into my original motion concerning the fact that the Defendant is being forced at this point before the Commonwealth has presented any testimony to set forth his defense, an element of his defense. I feel that is unconstitutional for the reasons I mentioned, violation of due process of law, his Fifth Amendment Right to remain silent, and his Sixth Amendment Right to confront witnesses.

I'm attempting to remedy this. I don't know how to solve this problem in the statute.

That's the only way, I think, of the possible solution of it. If you feel you have to be present, fine. The Court can rule.

MRS. HERR: The Court has ruled that I can be present.

MR. NUFFORT: Okay, let's bring him in then.

THE COURT: I haven't ruled on your next request: That is that the District Attorney be prohibited from discussing the content of the (15) hearing with the prosecuting witness.

MR. NUFFORT: I believe you have not ruled on that. I guess that's correct.

MRS. HERR: Well, I certainly wouldn't want to do anything unethical, but I can't see that it would be. The purpose of an in camera hearing is to take it out of the hearing of the Jury alone.

THE COURT: That's right. There is nothing stated in the Statute that the matter shall not be disclosed to the prosecuting witness, and consistent with the legislative

intent behind the Act as I view it I think it would be permissible for the District Attorney to discuss the content of the in camera hearing with the prosecuting witness so long as it is done out of the hearing of any Jurors or perspective Jurors.

MRS. HERR: Thank you, your Honor.

MR. NUFFORT: Why not bring the Defendant in then?

TRANSCRIPT OF TESTIMONY

* * * * * * * *

(192) THE COURT: You rest?

MR. NUFFORT: Yes, we rest.

THE COURT: Any rebuttal?

MRS. HERR: No, your Honor—

Excuse me, your Honor, yes, I do.

THE COURT: All right.

MR. NUFFORT: May we approach the bench?

THE COURT: Not now.

MR. NUFFORT: I would just like an offer, your Honor.

(Whereupon, there was a sidebar conference, off the record.)

(Whereupon, the Court Reporter was called to sidebar, and the following proceedings transpired:)

MRS. HERR: If the Court please, I would like to call Pamela Fisher, the victim, as a (193) rebuttal witness to refute testimony given by the Defendant that he, in fact, had sexual intercourse with her sometime during the summer months of 1975.

MR. NUFFORT: Your Honor, I object to that based on the following through of the objections I made prior to the time of trial that the Defendant was forced to reveal to the Commonwealth prior to trial that that was evidence that he would be presenting.

THE COURT: The Court doesn't see how it would prejudice the Defendant at all. Your motion is respectfully refused.

MR. NUFFORT: I guess the offer of proof is accepted?

THE COURT: That's right.

(Whereupon, the sidebar conference was concluded.)

REBUTTAL EVIDENCE

MRS. HERR: Pamela, will you take the stand.

* * * * * * *

IN THE COURT OF COMMON PLEAS OF
LANCASTER COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

No. 1230 of 1976

COMMONWEALTH OF PENNSYLVANIA

vs.

WILLIAM MICHAEL STRUBE

MOTIONS IN ARREST OF JUDGMENT AND FOR A NEW TRIAL

AND NOW, this 29th day of March, 1977, the above-named Defendant, by his attorney, Richard P. Nuffort, Esquire, moves the Court to arrest the judgment against him and for a new trial in the above-captioned matter for the following reasons:

1. The verdict is contrary to the evidence.

2. The verdict is contrary to the weight of the evidence.

3. The verdict is contrary to the law.

4. The evidence was insufficient to sustain the verdict of the jury.

5. The Trial Court erred in refusing to affirm and read to the jury Defendant's additional Request for Charge.

6. The Court erred in permitting references to be made to the alleged offense having occurred at the Sons of Satan Clubhouse in Columbia, Pennsylvania.

7. The Court erred in refusing Defendant's motion made at the time of the trial to find Act No. 53 of 1976, Section 3104; 18 P.S. 3104 unconstitutional, and in forcing the Defendant to make an offer of proof concerning the introduction of evidence of the alleged victim's past sexual conduct with the Defendant.

8. The Court erred in allowing the District Attorney to be present at the in camera hearing held pursuant to the above statute, and in refusing to instruct the District Attorney not to discuss what transpired at the in camera hearing with the prosecutor or the alleged victim of the crime.

The Defendant reserves the right to file additional and supplemental reasons for a new trial and in arrest of judgment when the notes of testimony taken at the trial have been transcribed, and a copy thereof made available to counsel for the Defendant.

Geisenberger, Zimmerman,
Pfannebecker & Gibbel
By: Richard P. Nuffort
Attorney for Defendant

Order, Court of Common Pleas, Lancaster Co.

IN THE COURT OF COMMON PLEAS OF
LANCASTER COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

No. 1230, 1976

COMMONWEALTH OF PENNSYLVANIA

vs.

WILLIAM MICHAEL STRUBE

ORDER OF COURT

AND NOW, to wit, March 31, A.D., 1978, the defendant's post-trial motions are refused and the defendant is ordered to appear before us for sentencing at a time to be fixed by the Lancaster County Court Administrator. The defendant shall appear at the Lancaster County Adult Probation Department for the purpose of assisting in the preparation of a presentence report at least ten (10) days prior to the sentencing date.

By the Court,

(s) John A. Walter, J.
John A. Walter
52nd Judicial District
Specially Presiding

Opinion, Court of Common Pleas

IN THE COURT OF COMMON PLEAS OF
LANCASTER COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

No. 1230, 1976

COMMONWEALTH OF PENNSYLVANIA

vs.

WILLIAM MICHAEL STRUBE

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* * * * * * * *

Opinion, Walter, J., 52nd Judicial District, Specially Presiding, March 31, A.D., 1978.

The defendant, William M. Strube was convicted of the crimes of rape and simple assault by a jury at the March, 1977 Term of Criminal Court. He filed timely post-trial motions for a new trial and, in the alternative, in arrest of judgment.

The usual boiler plate reasons were listed in support of the motions to wit: the verdict was contrary to the evidence, the weight of the evidence and the law; the evidence was insufficient to sustain the verdict of the jury. Defendant then assigned six additional errors allegedly made by the Court, as supplemental reasons. We have had the benefit of briefs from both sides; the matter has been submitted to us without oral argument.

We will treat with the original reasons first; the errors, seriatum.

"Evidence is sufficient to support a conviction if, accepting as true all the evidence and all reasonable inferences arising therefrom upon which (if believed) the fact-finder could properly have based its verdict, it is sufficient in law to prove beyond a reasonable doubt that the defendant is guilty of the crime of which he was convicted." *Commonwealth v. Kinnard,* 230 Pa. Superior 134, 326 A.2d 541 (1974). See also: *Commonwealth v. Malone,* 444 Pa. 397, 281 A.2d 866 (1971); *Commonwealth v. Johnson,* 458 Pa. 23, 326 A.2d 315 (1974); *Commonwealth v. Ilgenfritz,* 466 Pa. 345, 353 A.2d 387 (1976). In addition we are to consider the evidence in a light most favorable to the Commonwealth as verdict winner.[1] Having done so we conclude the evidence was sufficient to sustain defendant's convictions.

In brief, the evidence established that in the early morning hours of May 7, 1975 after an argument with her boyfriend stemming from a party they had just left, Pamela Kay Fisher jumped out of his truck. Shortly thereafter, she accepted a ride home from a male friend. On the way they stopped for gas and met three other young men who, under the pretext of going to another party[2] took her to a building out in the country known as the Pagans or Sons of Satan Motorcycle Club.

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[1] *Commonwealth v. Tabb,* 417 Pa. 13, 207 A.2d 884 (1967); *Commonwealth v. Ilgenfritz,* supra.

[2] Miss Fisher had worked at her job as a machine operator for a brass foundry until 11:00 p.m., then attended the first party with her boyfriend.

After being given a beer Miss Fisher was embraced by one of the three men who started to kiss her. When she resisted, the defendant joined the first man. Together they pushed her down on a set of double sofas located behind her. When they would not let her up she swung her hand out and struck the defendant in the face. With that he arose, punched her nose causing it to bleed, then hit her two more times. He fetched a wooden club from the opposite end of the clubhouse and leaned it against one end of the sofa. He then told Miss Fisher to arise.

She refused, was pulled down to the door of entry where there were two other sofas and ordered to undress. Stalling for time while trying to unlock the door behind her, she persuaded defendant to disrobe first. Unable to unlock the door, Miss Fisher was caught, her clothing forcibly removed, her brassiere snap broken off and jeans slightly torn. The defendant pushed her down on the sofa and had sexual intercourse with her.

Because of Miss Fisher's struggle to get free the defendant resumed beating her about the head with his hands.[3] The sofas parted and she fell to the floor, pretending unconsciousness. The defendant poured the remainder of her beer over her and she feigned revival. She gathered her clothing, put them on and with some trepidation left the clubhouse with the men. When they stopped at a diner in Wrightsville, her home town, she got away

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[3] A State Trooper testified he observed at 4:30 o'clock that afternoon, inter alia, a brush burn and bruise of her cheekbone beside her right eye, a slight darkness and bruises in the corners of both eyes, a bruise and abrasion of the left elbow, a bruise of the left knee.

and ran to her house. After cleaning up and sleeping a few hours she reported the incident to the police.

The victim's testimony of the forcible nature of the intercourse is enough to sustain a conviction of rape, if her testimony is reliable and uncontradicted by other witnesses as to other issues. *Commonwealth v. Richardson,* 232 Pa. Super. 123, 334 A.2d 700 (1975). In *Richardson,* the Court upheld a conviction of rape where the only evidence was the victim's testimony and her torn dress, which is basically the Commonwealth's evidence here.

Furthermore, the Commonwealth does not have to prove that the victim actively opposed the unlawful acts. *Commonwealth v. Hayden, et al,* 224 Pa. Super. 354, 307 A.2d 389 (1973). All that need be shown is that the assailant forced the victim to have sexual intercourse with him and the victim did not or could not consent to the act. *Commonwealth v. Simmons,* 239 Pa. Super. 220, 362 A.2d 402 (1976).

Here, the victim testified that defendant beat her about the face and head (N.T. 44) and that a large club was used to intimidate her. In addition, a Pennsylvania State Policeman interviewed the victim within fourteen hours after the rape, and saw the fresh bruises, brush burns, and abrasions, and that her eyes were darkened. Thus the Commonwealth presented evidence of defendant's use of force; it was up to the jury to decide the credibility of such evidence. That testimony alone was all that was required under Pennsylvania case law.

The same reasoning holds with respect to defendant's conviction of simple assault. Under Section 2701 (a) (1) of the Pennsylvania Crimes Code, an assault is committed

when a person attempts to cause or intentionally, knowingly, or recklessly does cause bodily injury to another. Here, the victim testified that defendant caused her bodily harm with his fists; the credibility of such a claim was for the jury to decide.

There is a dearth of cases specifically dealing with the evidence needed to sustain a conviction of simple assault. However, in *Commonwealth v. Alexander,* 237 Pa. Super. 111, 346 A.2d 319 (1975), a case involving a charge of aggravated assault, the Court said that the Commonwealth need only prove serious harm and intent, to sustain a conviction. Analogizing, the only difference here is the degree of harm. We are persuaded the Commonwealth met its burden.

It has long been the law in Pennsylvania the fact-finder is the final arbiter of conflicting testimony. The defendant is not entitled to a new trial or arrest of judgment merely because the jury refused to believe none of this happened and that the victim not only consented but encouraged him to engage in sexual intercourse with her. Nor is defendant entitled to relief for any other reason on these issues.

The defendant next argues the Court erred in refusing to affirm and read to the jury defendant's additional request for charge. He objects to certain comments made by the District Attorney in her closing argument. She expressed incredulity at a defense witness[4] when that individual related what the District Attorney characterized

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[4] One of the three men who took the victim to the clubhouse but who apparently did not engage in any physical touching of her.

as an unfounded fear of criminal liability stemming from the incident. Defendant urges those comments were misleading and asserts the Trial Court should have granted his request to give corrective instructions to the jury.

Defendant's argument is untimely. The Supreme Court in *Commonwealth v. Mennyweather,* 458 Pa. 12, 329 A.2d 493 (1974), cited the long-standing rule regarding the timeliness of objections by counsel:

> "When counsel misstate facts or material evidence, or resort to comment unfair or unduly prejudicial to the other side, it is the duty of the opposing counsel at once to call the attention of the court to the matter . . ." (Citations omitted.)

In that case the defendant claimed in his post-trial motions the prosecution made certain comments in summation which drew the jury's attention to the defendant's failure to take the stand. The Court said that since there was no objection to those comments, the issue was waived and cannot be considered on appeal.

Here, the situation is almost identical. Defendant now initially raises the question of the impropriety of the District Attorney's remarks, to which he made no objection at trial. There was an off-the-record sidebar discussion after the closings, followed by an on-the-record denial by the Trial Judge of the request for additional charge. No exception was taken to the denial. In *Commonwealth v. Hornberger,* 199 Pa. Super. 174, 184 A.2d 276 (1962), the Court said that if no exception was made at the time, then there was no prejudicial error in the failure to charge more fully. That was also a rape case and the charge concerned the issue of circumstantial evidence.

Because defendant did not object to the District Attorney's remarks, failed to except to the denial of his request for corrective instructions, and considered the issue of such little importance as to ignore having the sidebar discussion concerning it placed on record, the matter cannot now be considered.

Defendant's second assignment of error involves the action of the Trial Court permitting reference to be made to the locus of the incident as the "Sons of Satan Clubhouse". During a pretrial conference in chambers, defendant initially objected to the term "Sons of Satan Clubhouse" proposed by the Commonwealth for use at trial. The Court told the defendant to object when the term was first used at trial and to enter a continuing objection at that juncture.

During trial the initial articulation of the monicker was heard by the jury when a state trooper mentioned it in referring to his search warrant. No objection was made by defendant. Later, the defendant on cross-examination concerning the place the incident occurred, mentioned the name and told of his relationship to the club. At a sidebar conference immediately requested defense counsel entered his objection and moved for a mistrial, or in the alternative, asked the jury be instructed to disregard the "Sons of Satan" remarks and the District Attorney ordered to refrain from any further inquiries and statements in that regard. The trial Court overruled the objection and refused all motions, finding the objection untimely and the cross-examination not inflammatory.

An objection raised now to the first reference of the "Sons of Satan Clubhouse" cannot be considered. The

Supreme Court in *Commonwealth v. Kuterbach,* 458 Pa. 318, 326 A.2d 283 (1974) ruled:

> "Since the appellant did not object to the admission of that evidence when it was offered during the trial, no error was committed by the trial court."

To the same effect see *Commonwealth v. Ransom,* 240 Pa. Super. 92, 360 A.2d 721, (1976) and *Commonwealth v. Stiles,* 229 Pa. Super. 411, 323 A.2d 841 (1974).

Despite failure to object at the first reference we must decide whether the remarks were so inflammatory as to constitute reversible error. The rule is that a trial error will not reverse conviction unless it deprived the defendant of the fundamentals of a fair trial. *Commonwealth v. Lopinson,* 427 Pa. 284, 234 A.2d 552 (1967). The Court will look at the record in its entirety to see if the error had any influence on the verdict, even if a Motion to Strike was denied. *Commonwealth v. Ravenell,* 448 Pa. 162, 290 A.2d 365 (1972).

In the case at bar, it is hard to conceive how the cross-examination deprived defendant of a fair trial. The jury had already heard "Sons of Satan Clubhouse" mentioned without any objection from defendant. The second time, it was mentioned as the place where the alleged crime occurred. But the District Attorney immediately cross-examined defendant and established he was not a member of the Club, his connection to it came mostly through work performed on the Club's motorcycles and barroom. Thus, we see no prejudicial effect on the jurors, nor was it error to overrule defendant's objection and motions.

Defendant's third averment of error lies in the Court's refusal of defendant's motion for exclusion of evidence

under 18 P.S. 3104, prior to trial. The statute in question[5] provides:

> "(a) General Rule. —Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.
>
> "(b) Evidentiary proceedings. —A defendant who proposes to offer evidence of the alleged victim's past sexual conduct pursuant to subsection (a) shall file a written motion and offer of proof at the time of trial. If, at the time of trial, the court determines that the motion and offer of proof are sufficient on their faces, the court shall order an in camera hearing and shall make findings on the record as to the relevance and admissibility of the proposed evidence pursuant to the standards set forth in subsection (a)."

At a pretrial conference in chambers, defendant asked the Trial Court to declare that Act unconstitutional. It refused so to do for lack of compelling reasons. An in camera hearing was arranged immediately pursuant to the dictates of the statute and at defendant's request in order to offer proof of his prior sexual relations with the victim. Defendant demanded the District Attorney be excluded.

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[5] Act of December 6, 1972, P.L. ——, No. 334, Section 1, as amended by Act of May 8, 1976, P.L. 120, No. 53, Section 1.

The Trial Court turned aside the demand and further declined to order her not to reveal to the victim and the prosecuting officer, what transpired at the hearing.

Defendant ardently and ably argues the Act is violative of his due process rights under the 14th Amendment to the United States Constitution in that it forces him to disclose his defense to the charges, and claims the Act compels him to relinquish his right to remain silent under the 5th Amendment. He urges the District Attorney's presence and freedom to reveal the proceedings, in concert with the Trial Court's rulings, further infringes upon those rights.

Defendant relies on *Commonwealth v. Cantakos,* 455 Pa. 136, 314 A.2d 259 (1974). There the Pennsylvania Supreme Court found the dictates of Pa. R. Crim. P. Rule 312, relating to disclosure of alibi defenses, to be unconstitutional in light of *Wardius v. Oregon,* 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed. 2d 82 (1973). In that case the U. S. Supreme Court prohibited enforcement of such rules unless reciprocal discovery rights are given to criminal defendants.

But defendant's reliance is misplaced. The distinction between disclosure of an alibi, as in *Cantakos,* and the disclosure of defendant's previous sexual relations with a rape victim as part of his defense, is considerable. In *Cantakos,* and *Wardius* the Courts referred to defendant's disclosure of his *whole* alibi defense. Theretofore a criminal defendant had to reveal virtually his entire case to the prosecutor, if alibi was an integral part of it, while the latter was not forced to give the defense even a peep into his data.

The rule in question here does not require disclosure of a complete defense, but rather only notice of an element of evidence.[6] It is not a question of disclosure of witnesses. since it would only be the victim's word against the defendant's.

Mr. Strube's contention that his rights against self-incrimination are violated by the rule is a bit illogical. To restate it, the rule requires a written motion filed before trial and an offer of proof at trial. But defendant is not forced to file the motion, nor is he required to disclose evidence of a previous encounter with the victim. One would presume that a defendant cannot remain silent if he intends to disclose such evidence at trial. And finally —what crime is he confessing by revealing a prior consensual act?

Even more unsound is defendant's argument for exclusion of the District Attorney from the in camera hearing on the offer of proof. Section 3104 (b) of the Crimes Code only requires an "in camera" hearing; it makes no mention of excluding the District Attorney or anyone else. *Black's Law Dictionary,* 4th Edition, defines "in camera" as:

> "In chambers; in private. A cause is said to be heard In Camera either when the hearing is had before the judge in his private room or when all spectators are excluded from the courtroom."

Thus the emphasis is on privacy for the parties and the judge, not the secrecy from one of the parties. The purpose of an offer of proof is to demonstrate the relevancy of the evidence to both parties and the Court. It follows

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[6] That the defendant had sex with the victim before.

then, to eliminate the District Attorney would have been to afford defendant an ex parte hearing with ex parte rulings—eminently unfair even in today's world and precluding an adversary testing of that standard—relevancy.

Defendant's fourth assignment of error claims the Court erred in not sustaining defendant's demurrer to the charge of rape.

At the end of the Commonwealth's case defendant demurred to the evidence on the grounds force was never proved. The Trial Court overruled it, and defendant proceeded to present evidence of his defense. His contention that was error cannot now be properly considered. For the refusal of the Trial Court to sustain defendant's demurrer to the evidence cannot be reviewed where the defendant offers evidence. See *Commonwealth v. Spanos,* 167 Pa. Super. 629, 76 A.2d 243 (1950); *Commonwealth v. Moore,* 398 Pa. 198, 157 A.2d 65 (1959) and *Commonwealth v. Lucchese,* 66 Berks 144 (1972) affirmed 233 Pa. 273, 335 A.2d 508 (1975).

Since we find the evidence was sufficient to support the verdict, it certainly was strong enough to withstand defendant's demurrer and allow the case to go to the jury. Defendant's allegation the Trial Court erred in not granting his demurrer is without merit.

We turn now to defendant's fifth assignment of error. After deliberating approximately seven hours the jury returned to the courtroom with a written question: "If mitigating circumstances apply to this case, and if so how may the jury consider mitigating circumstances?" Defendant requested the jury again be advised if they have a reasonable doubt on his guilt he should be given the

benefit of it. The Trial Court refused. Defendant now claims that as error.

The following colloquy took place between the Trial Judge and the jury through its foreman:

> "The only way I can really answer that, members of the Jury, is to restate to you the law that applies to the facts as you might find them. Would you want me to do that again?
>
> "The Foreman: Your Honor, I don't think that is necessary, speaking for the Jury. I—
>
> "The Court: We don't want you to reveal where you are in voting or what direction you are going.
>
> "The Foreman: Our voting is already done. We are considering the format of presentation. How we should present our results is more the question.
>
> "The Court: Well, the mitigating circumstances—
>
> "The Foreman: It is possibly a matter of definition of mitigating circumstances.
>
> "The Court: Well, it's not like military justice where there are mitigating and extenuating circumstances which are found and considered by a Court. At least that's the way it used to be when I served on special Courts-Martial more than 20 years ago.
>
> "What you must follow in your own mind if there are quote mitigating unquote circumstances here would be the measure of proof as you could draw from the testimony given and the directions given to you by the Court with respect to the law, itself; the definition of reasonable doubt, the definition of the

elements of both charges, and the application of the definition to the testimony, to the evidence presented both as to the definitions as to the elements and reasonable doubt as I defined that for you, but there are no mitigating circumstances as such that are described by statute that would be part of the process of reasoning by which you would arrive at your verdict.

"The Foreman: Okay, I think that is an acceptable answer to our question, your Honor."

There is no duty on the part of the Trial Judge to repeat himself. *Commonwealth v. Toney,* 439 Pa. 173, 266 A.2d 732 (1970) and *Commonwealth v. Chester,* 410 Pa. 45, 188 A.2d 323 (1963). We are persuaded, on examining that passage of the record as well as the charge in its entirety, this assignment of error lacks merit.

Defendant's final contention alleges it was error for the Trial Court not to inform him of the jury's recommendation of mercy written on the verdict slip before asking defendant if he wanted the jury polled. Defendant now argues that the recommendation of mercy is a possible indication of indecisiveness on the part of some jury members and that a poll of the jury would have revealed this.

In *Commonwealth v. H ett,* 462 Pa. 363, 341 A.2d 122, 124 (1975), the Court said:

"Before the recorded verdict may be altered or amended, there must be a finding, and sufficient evidence to support the finding, that the recorded verdict did not reflect the obvious intention of the trier of facts. Moreover, the burden of proof is upon the moving party."

Here, there is no indication at all that the verdict did not reflect the jury's intention; each member signed the verdict slip and all responded affirmatively when questioned as a group.

Other cases have held that the "recommendation of mercy" on a guilty slip is mere surplusage and is not binding on the Trial Court and does not affect the verdict in any way. *Commonwealth v. Bishop,* 285 Pa. 49, 131 A.2d 657 (1926); *Commonwealth ex rel. O'Leary v. Ashe,* 152 Pa. Super. 322, 32 A.2d 36 (1943); *Commonwealth ex rel. Bishop v. Claudy,* 2 Cumb. 105 (1905), affirmed 97 A.2d 54, 373 Pa. 523 (1952). We so view it here, particularly in light of the colloquy between the Court and jury reported above. Hence, this issue like all preceding it falls for want of redeeming virtue.

Judgment of the Pa. Superior Court

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 2105 October Term, 1978

COMMONWEALTH OF PENNSYLVANIA

v.

WILLIAM MICHAEL STRUBE,

Appellant

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of LANCASTER County be, and the same is hereby AFFIRMED.

By the Court:

(s) J. Haniel Henry

J. Haniel Henry

Prothonotary

Dated: December 28, 1979

Majority Opinion

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 2105 October Term, 1978

COMMONWEALTH OF PENNSYLVANIA

v.

WILLIAM MICHAEL STRUBE,

Appellant

Appeal from the Order and Judgment of Sentence in the Court of Common Pleas of Lancaster County, Criminal Division, No. 1230, 1976.

Before: Price, Spaeth, and Lipez, JJ.

Opinion by Price, J., filed Dec. 28, 1979:

In this appeal we are asked to determine the constitutionality of a portion of the Pennsylvania rape shield law (18 Pa. C.S. §3104(b)). Because we find that section of the Crimes Code passes constitutional muster in the face of the arguments advanced, and because we determine appellant's other allegations of error to be without merit, the order and judgment of sentence are affirmed.[1]

[1] Appellant was convicted of rape (18 Pa. C.S. §3121(1)) and simple assault (18 Pa. C.S. §2701(a)(1)), following a jury trial concluded on March 23, 1977. Subsequent to the denial of post-trial motions, he was sentenced to concurrent terms of from 14

Viewing the evidence in the light most favorable to the Commonwealth as verdict winner, the following is a summary of the pertinent facts adduced at trial. After leaving work at 11:00 p.m. on May 7, 1976, Miss Pamela Kay Fisher accompanied her boyfriend to a party hosted by a mutual acquaintance. The occasion failed to produce a convivial atmosphere between the two, and an argument ensued which later prompted Miss Fisher to leave her companion's truck during the ride home following the party. She was quickly picked up by another male friend, and while the two were stopped at a gas station, they encountered three friends, including appellant, who invited them to another party. In fact, the three took Miss Fisher, unaccompanied, to a building used by the Sons of Satan Motorcycle Club.

After entering the building and being given a beer, Miss Fisher was embraced by one of the three men. When she resisted, appellant joined the fracas and forced the victim onto a sofa. Miss Fisher swung her hand out and struck appellant, who promptly responded by bloodying Miss Fisher's nose and striking her twice more. He then ordered her to rise, and upon her refusal, dragged the victim to another sofa and demanded that she undress. Stalling for time, Miss Fisher persuaded appellant to undress first, while she surreptitiously attempted to unlock the front door. The endeavor was unsuccessful, and appellant tore off her clothing, forced her upon the sofa, and proceeded to have intercourse with the victim. During this time,

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months to 5 years imprisonment on the rape conviction, and from 6 to 23 months on the simple assault conviction. He was also ordered to pay a fine of $500 and costs of prosecution for the rape offense, and a fine of $100 for the simple assault offense.

appellant continued to pummel Miss Fisher about the head because of the latter's struggle to free herself. She finally feigned unconsciousness and a later "revival", and was then allowed to gather her clothing, dress, and leave the clubhouse still in the company of her three abductors. When the group stopped for dinner, Miss Fisher escaped, and after a short rest at home, reported the incident to the police.

Appellant's first contention is based on the following facts. Prior to trial, appellant filed a motion and offer of proof indicating his intention to introduce evidence establishing the victim's prior sexual conduct with appellant, as well as her consent to the sexual intercourse on the night in question. This motion was submitted pursuant to 18 Pa. C.S. §3104 (b) which provides:

> " (a) General rule. —Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.
>
> (b) Evidentiary proceedings. —A defendant who proposes to offer evidence of the alleged victim's past sexual conduct pursuant to subsection (a) shall file a written motion and offer of proof at the time of trial. If, at the time of trial, the court determines that the motion and offer of proof are sufficient on their faces, the court shall order an in camera hearing and

> shall make findings on the record as to the relevance and admissibility of the proposed evidence pursuant to the standards set forth in subsection (a)."

Appellant accompanied the above motion with a challenge to the constitutionality of the statute, alleging that its effect was to deny him his fifth amendment rights, his right to due process, and his right to confront his accusers. Following an in camera hearing convened in accordance with 18 Pa. C.S. §3104(b), and attended by the district attorney, the Honorable John A. Walter ruled the statute constitutional and held that appellant could testify at trial, if he so chose, as to his prior sexual relations with the victim. The hearing judge also ruled that the assistant district attorney would not be forbidden from discussing the in camera proceedings with the victim or any other Commonwealth witness.

Appellant now raises two challenges to the constitutionality of 18 Pa. C.S. §3104(b).[2] Initially, he cites the decisions by the United States Supreme Court in *Wardius v. Oregon,* 412 U.S. 470 (1973), and that of our own supreme court in *Commonwealth v. Contakos,* 455 Pa. 136, 314 A.2d 259 (1974), as support for his contention that the disclosure requirement of 18 Pa. C.S. §3104(b) violates

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[2] Appellant's brief to this court contains a tripartite attack on the statute's validity. One argument, however, dealing with the statute's alleged infringement of his sixth amendment right to a trial by jury, was not presented to the trial court in appellant's written post-trial motions, nor was it discussed in the court's opinion on those motions. It has consequently not been preserved for appellate review. Commonwealth v. Carr, 471 Pa. 86, 369 A.2d 1207 (1977); Commonwealth v. Blair, 460 Pa. 31, 331 A.2d 213 (1975).

his due process rights guaranteed by the fourteenth amendment. We disagree.

The *raison d'etre* of 18 Pa. C.S. §3104, and similar rape shield laws in other jurisdictions, is to partially correct the manner in which our criminal justice system has approached the victim of a sexual assault. That system, and society in general, has been severely criticized as being overly solicitious in protecting the interests of the alleged male perpetrator, to the virtual exclusion of the female's sensibilities and legal rights.[3] In apparent response to this condemnation, several jurisdictions have enacted legislation designed to alleviate the physical trauma and emotional disorientation suffered by the sexually assaulted female. *E.g.*, 1974 Conn. Pub. Acts. 74-131; 1974 Iowa Acts ch. 1271, §2 (repealing the requirement that testimony of

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[3] *See, e.g.*, S. Brownmiller, Against Our Will: Men, Women and Rape (1975); Berger, Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom, 77 Colum. L. Rev. 1 (1977) [hereinafter cited as Berger]; Meyer, Rape: The Victim's Point of View, 3 Police L.Q. 38 (1974); Comment, Rape and Rape Laws: Sexism in Society and Law, 61 Calif. L. Rev. 919 (1973); Note, The Victim in a Forcible Rape Case: A Feminist View, 11 Am. Crim. L. Rev. 335 (1973).

This disapprobation with which rape victims are viewed is not amenable to rational justification, but is instead apparently predicated on historical, emotional, and pseudo-psychological factors. In a traditionally male dominated society, there has been a tangible expression of 'fear and loathing' directed toward the female who would cry rape; such fear being rooted in concepts as ancient as the biblical notion of female vengeance (exemplified in the parable of Potiphar's wife, *see* Genesis 39 and Brownmiller, *supra* at 21-23) and as recent as Freud's psychological proposition that women frequently and graphically fantasize about rape, *see* III Wigmore, Evidence §924(a) (3d ed. 1940).

complainant be corroborated); Act of July 30, 1975, P.L. 131, No. 65, §1, 35 P.S. §10171 (requiring health education institutions to give instruction in treating rape victims to provide for their physical and emotional well being); Minn. Stat. Ann. §§241.51 to 53 (Supp. 1979) (directing development of community-based programs to aid victims of sexual assault); *see generally* Rudstein, Rape Shield Laws: Some Constitutional Problems, 18 William and Mary L. Rev. 1, 2-3 (1976) [hereinafter cited as Rudstein]. The most prevalent type of reform, however, deals with statutes altering the traditional rules of evidence in rape cases so as to limit in some degree the defendant's inquiry into the previous sexual life of the alleged victim.[4]

At common law, rape had traditionally been defined as sexual intercourse between a male and a female, not his wife, by force and against her will. *See, e.g.*, 18 Pa. C.S. §3121; Perkins, Criminal Law 152 (2 ed. 1969). Such a definition made lack of consent a material element of the offense, and its presence a recognized defense. To assist the defendant in establishing such consent, it has almost universally been held that one accused of forcible rape may attempt to prove the complainant's bad character for chastity.[5] *See* I Wigmore, Evidence §§66, 200

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[4] At least 32 jurisdictions have adopted some type of rape shield law. For a list of these statutes as of January 1977, *see* Berger, *supra* at 32, n. 196.

[5] This is not the sole judicial assistance offered the rape defendant; the requirement of corroboration and strict proof of forcible resistance have been long established and recently condemned by contemporary reformers. The rationale for such formidable barriers to conviction was voiced by Lord Hale thusly:

> "A charge [of rape] such as that made against the defendant in this case is one which is easily made and, once

(3d. ed. 1940). This constitutes an exception to the general rule in criminal law that evidence of bad character, whether reputation, opinion from observation, or specific acts, will not be received to prove that the person whose character is sought to be shown engaged in certain conduct on a particular occasion. *Commonwealth v. Connolly*, 217 Pa. Super Ct. 201, 269 A.2d 390 (1970); 1 Wigmore, Evidence §57 (3d ed. 1940); McCormick, Evidence §91 (2d ed. 1972).[6] Although this information might possess some degree of relevancy, "a doctrine of Auxiliary Policy . . . operates to exclude what is relevant, —the policy of avoiding the uncontrollable and undue prejudice, and possible unjust condemnation, which such evidence might induce. . . ." I Wigmore, Evidence §57 (3d ed. 1940).

In the case of rape, however, the admission of such testimony is merely one facet of the offense which makes it *sui generis*.[7] It is premised on the *a priori* conclusion of the courts that it is more probable that an unchaste

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made, difficult to defend against, even if the person accused is innocent.

Therefore, the law requires that you examine the testimony of the female person named in the information with caution."

1 M. Hale, History of the Pleas of the Crown, 635 (1st Am. ed. 1847).

[6] This general tenet admits of several exceptions, two of which being that such evidence is admissible when the defendant initially offers evidence of his good character, Commonwealth v. Sierakowski, 154 Pa. Superior Ct. 321, 35 A.2d 790 (1944), and in homicide cases when the accused raises an issue of self-defense. Commonwealth v. Amos, 445 Pa. 297, 284 A.2d 748 (1971).

[7] *See* Berger, *supra* at 7-10.

woman would assent to intercourse than a virtuous woman.[8] *See* Rudstein, *supra* at 4. The classic, if rather extravagant, formulation of this argument was advanced by Cowen, J., in *People v. Abbot,* 19 Wend. 192, 195-96 (N.Y. 1838):

> "The prosecutrix is usually, as here, the sole witness to the principal facts, and the accused is put to rely for his defense on circumstantial evidence. Any fact tending to the inference that there was not the utmost reluctance and the utmost resistance is always received. . . . The connection must be absolutely against the will; and are we to be told that previous prostitution shall not make one among those circumstances which raise a doubt of assent? That triers should be advised to make no distinction in their minds between the virgin and a tenant of the stew, —between one who would prefer death to pollution, and another who, incited by lust and lucre, daily offers her person to the indiscriminate embraces of the other sex? And will you not more readily infer assent in the practiced Messalina in loose attire than in the reserved and virtuous Lucretia? . . . [T]here is not so much probability that a common prostitute or the prisoner's concubine would withhold her assent as one less depraved; and may I not ask, does not the same probable distinction arise between one who has already submitted herself to the lewd embraces of another, and the coy and modest female severely

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[8] A very few courts have also taken the position that unchastity reflects on credibility as a whole, *i.e.*, unchastity imports dishonesty. *See* Frank v. State, 150 Neb. 745, 35 N.W. 2d 816 (1949).

> chaste and instinctively shuddering at the thought of impurity?"

A later writer, more restrained but no less dogmatic, opined that "no impartial mind can resist the conclusion that a female who had been in the recent habit of illicit intercourse with others will not be so likely to resist as one who is spotless and pure." *Lee v. State,* 132 Tenn. 655, 658, 179 S.W. 145, 145 (1915).[9]

Instantly, neither the traditional rules of evidence regarding the admission of such testimony, nor the question of whether there does indeed exist a causal connection between prior sexual activity and subsequent voluntary consent in light of contemporary sexual mores need detain us. The arguments are persuasive that the logical underpinnings of the character doctrine are dubious in the extreme. *See, e.g.,* Brownmiller, *supra;* Berger, *supra;* Comment, Rape Evidence Reform in Missouri: A Remedy for the Adverse Impact of Evidentiary Rules on Rape Victims, 22 St. Louis U.L.J. 367 (1978); Note, 9 Ind. L. Rev. 418, 429-30 (1976); Note, 7 Loyola L. J. 118, 125 (1976). More importantly for the purpose of our decision, 18 Pa. C.S. §3104(a) represents legislative determination that such evidence is inadmissable, save in severely limited situations.

What is certain is that the introduction of such evidence at trial has a highly traumatic and embarrassing effect on the complaining witness. Indeed, in our present adversarial system, the art of cross-examination in rape cases is often employed not as a rapier to reveal the nu-

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[9] For further judicial rhetoric along these lines, *see* Note, 3 Hofstra L. Rev. 403, 403 n. 3 (1975).

ances of a witness's testimony, but as a bludgeon to underscore the complainant's possibly checkered past.[10] Of course, as one commentator has noted, "it hardly seems appropriate to place embarrassment to the witness in the same class with the injury inflicted on the defendant if he is wrongly convicted at trial." Berger, *supra* at 41. Courts have, however, recognized a need to protect a person who takes the stand from attacks designed merely to harass or humiliate him. *See Alford v. United States,* 282 U.S. 687, 694 (1931).

The rape shield laws are legislative recognitions of the minimal probative value of sexual history and are designed to prohibit, to varying degrees, the travesty of presenting a noisome stream of defense witnesses testifying to the sexual propensities, often sordid and sometimes fanciful, of the complaining witness. The particular details of the various statutes are not germane to the instant discussion[11] although broadly they might be described by their relative position on a spectrum of admissibility

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[10] Such tactics, coupled with the system's perceived hostility to the rape complainant, may well account for the gross underreporting of the crime. It has been estimated that the actual incidence of rape ranges from three and one-half to twenty times the reported figure. Note, 81 Yale L.J. 1365, 1374-75 (1972).

[11] For an overview of the rape shield laws, *see* Berger, *supra* at 32-39; Rudstein, *supra* at 9-14. A closer examination of individual statutes may be found in the myriad law review articles on the subject. *See, e.g.,* Comment, Idaho Code §18-6105: A Limitation on the Use of Evidence Relating to the Prior Sexual Conduct of the Prosecutrix in Idaho Rape Trials, 15 Idaho L. Rev. 323 (1979); Comment, The Kentucky Rape Shield Law: One Step Too Far, 66 Ky. L. J. 426 (1977); Note, 52 Wash. L. Rev. 1011 (1977).

ranging from highly restrictive to highly permissive.[12] The former is exemplified by Michigan, which admits only conduct with the defendant and specific instances of sexual activity if the proof is material to a fact at issue and its "inflamatory or prejudicial nature does not outweigh its probative value." Mich. Comp. Laws Ann. §750.520j. At the opposite extreme are those statutes acting as little more than a reminder to the trial judge to take particular note of the character evidence presented. New York, for example, states a general rule, of exclusion then emasculates its efficacy with several specific exceptions and appends a final provision permitting the admission of evidence "determined by the court . . . to be relevant and admissible in the interests of justice." N.Y. Crim. Proc. Law §6042 (5). The majority of statutes fall between these two extremes.

Of more immediate import are those statutes, at least fifteen, which provide for a type of preliminary hearing similar to that contained in 18 Pa. C.S. §3104 (b).[13] While most do not discuss the form of the hearing, a majority expressly demand that the proceedings regarding admissibility be held in camera, *e.g.*, N.D. Cent. Code §12. 1-20-15 (3) (1975). Concerning the timing of the hearing, the statutes vary widely as to whether it should be held prior to or during trial.

It is this hearing and the concomitant disclosure of defense information that appellant deems repugnant to the

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[12] *See* Berger, *supra* at 33.

[13] Some statutes provide for no preliminary hearing. *E.g.*, Mont. Rev. Codes Ann. §45-5-503 (5); Ohio Rev. Code Ann. §2907.-02 (d)-(f).

principle of *Wardius v. Oregon,* 412 U.S. 470 (1973), which examined the Oregon notice of alibi rule. That statute provided that if a defendant proposed to rely on an alibi defense during trial, he was obliged to serve upon the district attorney a written notice of the purpose and details of such evidence within five days of trial. The obvious intent of the rule was to protect this state against an eleventh-hour defense composed of a fabricated alibi, the five day "lead-in" time furnishing the prosecution with a sufficient opportunity to investigate the exculpatory information. The defendant in *Wardius* failed to submit the requisite notice and, in accordance with the statute, was prohibited from introducing his alibi evidence at trial and was subsequently convicted. In reversing the conviction and remanding for a new trial, the Supreme Court, speaking through Justice Marshall, held that while the object of the rule was legitimate, its failure to provide for reciprocal discovery rendered it repugnant to the due process clause of the fourteenth amendment:

> "Although the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded . . . it does speak to the balance of forces between the accused and his accuser. . . . [I]n the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The State may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses. It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evi-



dence which he disclosed to the State." *Wardius v. Oregon, supra* at 474-75 (footnote omitted).

Our supreme court subsequently relied on *Wardius* in *Commonwealth v. Contakos,* 455 Pa. 136, 314 A.2d 259 (1974), when it struck down as unconstitutional Pennsylvania's version of the notice-of-alibi rule (former Pa. R. Crim. P. 312). Although the court noted some basic differences in the two rules, as well as the fact that Pennsylvania conferred upon the defendant some minimal discovery rights, it held the distinction insufficient to yield a result departing from that reached by the Supreme Court in *Wardius.*

Appellant attempts here, however, to bridge far too wide a chasm in analogizing the notice-of-alibi rule in *Wardius* and *Contakos* with the rape shield law, and several problems become apparent when importing the alien concept of reciprocity into these laws. First, the type of evidence which the defendant is forced to reveal in *Wardius* type situations is fundamentally different from the disclosure envisioned by the rape shield law. In the former, revelation of an alibi defense is tantamount to the disclosure of the entire defense based on mistaken identity. This was the pivotal point of *Wardius*—the fact that the prosecution received a comprehensive description of the defendant's case without the necessity to disclose even the slightest portion of its own accumulated information. Disclosure of unchastity evidence, however, is at least one step removed from the elements forming a charge of rape. That is, even if the evidence of prior sexual conduct is rebutted or disbelieved, the defendant has nevertheless not been precluded from being awarded an acquittal predicated on a defense of consent. Such disclosure is not in the

nature of a bald and unreciprocated disclosure of trial information, but is more akin to a pre-trial motion to rule on any number of evidentiary matters. Such a conclusion was reached by the Washington Court of Appeals in *State v. Blum,* 17 Wash. App. 37, 561 P.2d 226 (1977). In *Blum,* the court, replying to a due process attack made on the Washington Rape Shield Law,[14] noted the difficulty in delaying certain evidentiary rulings until the trial proper, and the salutary role of the motion in limine:

> "In making that determination and in ruling on the motion to admit or exclude evidence, the considerations are the same as those involved in ruling on the usual motion in limine." *Id.* at 44, 561 P.2d at 230.[15]

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[14] R.C.A. 9.79.150 provides for the general exclusion of the victim's past sexual conduct unless: the defendant makes a pretrial motion to the court and prosecutor accompanied by affidavits stating the offer of proof; the court holds a hearing outside the presence of the jury; the court concludes that the evidence is relevant to the victim's consent, its probative value is not outweighed by substantial prejudice, and its exclusion would result in the denial of substantial justice to the defendant.

[15] We note that in People v. Blackburn, 56 Cal. App. 3d 685, 128 Cal. Rptr. 864 (1975), the California Court of Appeals upheld the California Rape Shield law against constitutional attack, albeit not based on the *Wardius* requirement of reciprocity:

> "Evidence Code section 782, adopted in 1974 as a companion to the amendment to section 1103, imposes a procedural limitation upon the admissibility of evidence of sexual conduct of the alleged victim of rape or a related offense offered to attack her credibility. Section 782 requires that the testimony be preceded by a written motion by the defendant accompanied by an affidavit containing an offer of proof. If the trial court finds that the offer of proof is 'sufficient,' it must

The evidence released is thus merely a quantum of the defendant's case, not the whole of his defense.

Second, 18 Pa. C.S. §3401(b) does not provide the Commonwealth any "lead-time" to act on information it might gain as a result of the hearing. The requirement of disclosure at a specified time prior to trial was an integral part of the notice-of-alibi laws, for their purpose

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> conduct a hearing out of the presence of the jury and allow the alleged victim to be questioned 'regarding the offer of proof . . . .' 'At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant . . . and is not inadmissible pursuant to Section 352 of [the Evidence Code], the court may make an order stating what evidence may be introduced by the defendant, and the nature of questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.'
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> Defendant contends: . . . by requiring him to make an offer of proof before he presents his testimony, the section denies him his privilege against self-incrimination.
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> • • •
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> [But the California Supreme Court has stated]: 'A reasonable demand for factual information which, as in Jones, pertains to a particular defense or defenses, and seeks only that information which defendant intends to introduce at trial, may present no substantial hazards of self-incrimination and therefore justify the trial judge in determining that under the facts and circumstances in the case before him it clearly appears that disclosure cannot possibly tend to incriminate defendant.' (2 Cal. 3d at p. 327, 85 Cal. Rptr. at p. 134, 466 P.2d at p. 678.)'' *Id.* at 691-92, 158 Cal. Rptr. at 867-68.

In *Blackburn*, however, the offer and hearing were made immediately prior to the defense presentation and subsequent to the state's exposition of its case.

was to allow the state a sufficient amount of time to investigate the new information. Removing this feature from the rape shield law ensures that while the discovery procedure is, to a limited degree, a one-way street, the fact that it is necessarily a *cul-de-sac* obviates the danger of prejudice to the defendant.[16]

Finally, assuming *arguendo* that the state should be required to make some disclosure in the face of the defendant's offer, of what type evidence should this reciprocal information be composed? The symmetrical argument employed in *Wardius* would apparently require that the prosecution reveal the essence of the evidence it plans to employ in rebuttal,[17] but that evidence, focused on the narrow point of prior sexual history, is likely to be meager. Yet, if the state were forced to divulge material pertaining to the broader issue of consent or mistake, then it would be displaying its entire case while receiving precious little in return. Of course, as the Court in *Wardius* noted: "[t]he State's inherent information-gathering advantages suggest, that if there is to be any imbalance in discovery rights, it should work in the defendant's favor." *Wardius v. Oregon, supra* at 475 n.9. But allowing the defendant

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[16] While any danger of this might be further reduced by prescribing that the hearing be held immediately prior to introduction of the evidence, we do not deem such a step absolutely necessary. While a prosecutor might conceivably attempt to circumvent the intent of the rule by requesting a continuance immediately proceeding the pre-trial hearing, any such contrived maneuver should be summarily refused by the trial judge.

[17] *Wardius* required that the state disclose evidence which goes to the "refutation of the very pieces of evidence which [the defendant] disclosed to the State." Wardius v. Oregon, 412 U.S. 470, 476.

to force prosecutorial revelation upon the mere offer of proof would result in the distinct possibility of defense manipulation. While in general more liberal defense discovery is a worthwhile object, *see* Pa. R. Crim. P. 305, we cannot countenance such a potentially drastic alteration in the normal discovery procedure. Consequently, any analogy to *Wardius* and *Cotakos* is inappropriate.

Appellant's second argument directed against the statute relates to its alleged violation of his fifth amendment privilege against self-incrimination. In our resolution of this question, we are guided by the decision of the United States Supreme Court in *Williams v. Florida,* 399 U.S. 78 (1970). The challenge raised in *Williams* to the Florida notice-of-alibi rule was premised on the contention that the provision for a pre-trial hearing resulted in the disclosure of information furthering the defendant's conviction, thus compelling him to be a witness against himself in violation of his fifth amendment rights. In response, the Court observed,

> "In the case before us, the notice-of-alibi rule by itself in no way affected petitioner's crucial decision to call alibi witnesses or added to the legitimate pressures leading to that course of action. *At most, the rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the petitioner from the beginning planned to divulge at trial.* Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding

whether or not to take the stand himself." *Williams v. Florida, supra* at 85. (Emphasis added.)[18]

An identical situation prevails instantly: Appellant is merely required to accelerate his presentment in a manner not inconsistent with fifth amendment mandates; he is not compelled in the constitutional sense to reveal potentially damaging informations. As the court in *Williams* noted, the fact that a defendant faces the dilemma of whether to maintain complete silence or present a defense has never been held to be an invasion of the privilege against self-incrimination. *Id.* at 84. *See also, People v. Blackburn*, 56 Cal. App. 3d 685, 128 Cal. Rptr. 864 (1975) (California rape shield law held constitutional in face of similar attack). He remains unfettered in his decision on whether or not to take the stand; his actions are circumscribed by the rape shield law only after that decision has been made.

Appellant's second argument is based on a portion of the trial judge's charge. After deliberating some seven hours, the jury returned to the courtroom with the question: "If mitigating circumstances apply to this case, and if so how may the jury consider mitigating circumstances." (N.T. 278). The trial judge responded to the query as follows:

> "The Court: Well, it's not like military justice where there are mitigating and extenuating circumstances which are found and considered by a Court.

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[18] In dissent, Justices Black and Douglas argued that pre-trial pressures on the defendant differ in both form and degree from those operative at trial. That is, prior to trial the defendant is forced to disclose his defense or risk preclusion at a time when he is still ignorant of the strength of the case against him.

> At least that's the way it used to be when I served on special Courts-Martial more than 20 years ago.
>
> What you must follow in your own mind if there are quote mitigating unquote circumstances here would be the measure of proof as you could draw from the testimony given and the directions given to you by the Court with respect to the law, itself; the definition of reasonable doubt, the definition of the elements of both charges, and the application of the definition to the testimony, to the evidence presented both as to the definitions as to the elements and reasonable doubt as I defined that for you, but there are no mitigating circumstances as such that are described by statute that would be part of the process of reasoning by which you would arrive at your verdict.
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> "The Foreman: Okay, I think is an acceptable answer to our question, your Honor." (N.T. 279-80).

Following this exchange, appellant's counsel requested the court to "advise the Jury that if they have a reasonable doubt as to the Defendant's guilt, then he should be given the benefit of that doubt." (N.T. 281). The court refused to do so, noting that it had twice instructed the jury on this in its initial charge.

Appellant now concedes that the judge was correct in stating that there are no specific mitigating circumstances mentioned in the applicable statute, but argues that the court "should have pointed out clearly and unmistakably, as he had been requested to do by trial counsel . . . that the jury might find facts 'mitigating' against guilt beyond a reasonable doubt." (Brief for Appellant at 17). We disagree.

Although appellant couches his objection in terms of "mitigating circumstances", it is clear that he continues to take issue with the court's exposition of "reasonable doubt." A reading of the original charge, however, convinces us that the court copiously covered that point on two occasions. The court could not have provided a more comprehensive response to the jury's question without reiterating large portions of the initial charge, a duty which we have never imposed on the trial judge. *Commonwealth v. Toney,* 439 Pa. 173, 266 A.2d 732 (1970); *Commonweatlh v. Borris,* 247 Pa. Superior Ct. 260, 372 A.2d 451 (1977). Reading the charge as a whole, *Commonwealth v. Woodward,* Pa. , 394 A.2d 508 (1978); *Commonwealth v. Dougherty,* Pa. Superior Ct. , 393 A.2d 730 (1978), we can perceive of no error.

Appellant finally objects to references during trial which indicated that the offense was perpetrated at the "Sons of Satan" clubhouse, arguing that such information was irrelevant to the charges and highly inflammatory in light of the connotations of the name. We note preliminarily that during a pre-trial conference in chambers, appellant's counsel requested that because the location of the crime was undisputed, no reference to the "Sons of Satan" be allowed at trial. The request was denied, with the trial judge suggesting that an objection be made at the first mention of the name at trial with a continuing objection being had thereafter. In fact, no objection was made when the assistant district attorney first mentioned the club at trial. Any argument based on that incident is therefore waived. *Commonwealth v. Clair,* 458 Pa. 418, 326 A.2d 272 (1974).

The second reference occurred during the cross-examination of appellant. In response to the question, "What clubhouse is this?", he testified that it belonged to the Sons of Satan Motorcycle Club. Appellant then immediately denied any membership in the club. Some six questions later appellant's counsel interposed an objection to the reference, requesting either a mistrial or curative instructions, neither of which were granted by the trial court. (N.T. 137-39).

It is quite true, as appellant notes, that evidence which is logically relevant should be excluded when it would so inflame the minds of the jurors that its probative value is outweighed by unfair prejudice. *Commonwealth v. Bryant,* 461 Pa. 3, 334 A.2d 603 (1975); *Commonwealth v. Smalls,* 460 Pa. 436, 333 A.2d 853 (1975); *Commonwealth v. Hickman,* 453 Pa. 427, 309 A.2d 564 (1973); *Commonwealth v. Wright,* 227 Pa. Superior Ct. 134, 323 A.2d 349 (1974). Because no rigid rule be formulated to embrace the infinite range of evidence which might be proffered, and because the trial judge is in a far superior position to assess any possible prejudicial effect on the jury, we will not reverse the trial court's decision on admissibility absent an abuse of discretion. *Commonwealth v. Sero,* 478 Pa. 440, 387 A.2d 63 (1978); *Commonwealth v. Sullivan,* 472 Pa. 129, 371 A.2d 468 (1977); *Commonwealth v. Pilosky,* 239 Pa. Superior Ct. 233, 362 A.2d 253 (1976); *Commonwealth v. Kinnard,* 230 Pa. Superior Ct. 134, 326 A.2d 541 (1974).

Instantly, we can perceive of no such abuse. It was proper to inform the jury of the location of the offense, and the appellation "Sons of Satan" is not of such a lurid or morbid character to irretrievably prejudice the jury to-

ward appellant, particularly in view of appellant's emphatic denial of membership.

Judgment of sentence is therefore affirmed SPAETH, J., files a concurring opinion.

Concurring Opinion

[Caption Omitted]

CONCURRING OPINION BY SPAETH, J., filed Dec. 28 1979:

I concur in the result reached by the majority on all the issues raised on this appeal. I wish, however, to indicate specifically the limits of my agreement with the majority's conclusion that appellant's right to due process of law was not violated by 18 C.P.S.A. §3104 (Supp. 1979-80).

The United States Supreme Court has held that

> [i]t is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazards of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.
>
> *Wardius v. Oregon,* 412 U.S. 470, 476 (1973).

Such a requirement violates the defendant's right under the fourteenth amendment to the United States Constitution to due process of law. *Id. See also Commonwealth v. Contakos,* 455 Pa. 136, 314 A.2d 259 (1974). The majority concludes that "any analogy to *Wardius* and *Contakos* is inappropriate." Slip op. at 14. I suggest, however, that the reasoning in support of this conclusion is not persuasive.

The majority says that evidence of an alibi defense, which was what was involved in *Wardius* and *Contakos,* "is fundamentally different from" evidence of prior consensual sexual intercourse. Slip op. at 11. The difference does not seem to me so great. Both sorts of evidence bear directly upon an essential element of the offense.

It is true that section 3104 is not intended to be a discovery device for the Commonwealth; its purpose is to avoid confusion of issues at trial and needless embarrassment of the prosecutrix by excluding irrelevant (or at best marginally relevant) evidence concerning the prosecutrix's prior sexual behavior. It is also true that in providing that a defendant who wishes to offer evidence of the prosecutrix's past sexual relations with him may file a written motion and offer of proof *at the time of trial,* and in further providing that the motion, offer of proof, and subsequent hearing shall address only "the relevance and admissibility of the [defendant's] proposed evidence," section 3104 minimizes the risk that the Commonwealth will gain unfair pre-trial discovery of the defendant's case. Nevertheless, it is easy to suppose a case where the Commonwealth might convert the evidentiary proceeding under 3104 into a discovery device. Suppose, for example, a case in which the defendant makes an offer of proof that he and a friend will testify that the prosecutrix had consensual sexual intercourse with the defendant in the defendant's home the day before the alleged rape, and further, that the friend knows this because he witnessed the act. A hearing is held, and the court rules that the proposed evidence is relevant and admissible on the issue of the prosecutrix's consent at the time of the alleged rape. Then, while trial is being held, the Commonwealth conducts an investigation for evidence to rebut the friend's proposed testimony. Through the investigation, the Commonwealth discovers that the friend's mother is willing to testify that her son could not have witnessed sexual relations between the prosecutrix and the defendant because on the day in question her son was with her in a city a

hundred miles away from the defendant's home. Were the Commonwealth to introduce the mother's testimony without giving the defendant timely notice that it intended to do so, I should question whether the Commonwealth's exploitation of the procedures under section 3104 was not forbidden by *Wardius* and *Contakos,* for the defendant would have been required "to divulge the details of his own case while at the same time [being subjected] to the hazards of surprise concerning refutation of the very pieces of evidence which he disclosed to the State." *Wardius v. Oregon, supra* at 476.

I am not sure how I should decide a case such as the one I have just supposed. I submit, however, that we should not do as the majority does, which is to decide it now. Instead, we should decide each case as it arises, and on its particular facts, for in some case, contrary to the majority, an analogy to *Wardius* and *Contakos* may be most appropriate.

I concur in the result reached by the majority because when the particular facts of this case are examined, it will be seen that appellant was not required "to divulge the details of his own case while at the same time [being subjected] to the hazards of surprise. . . ." Immediately before trial, appellant filed a written motion and offer of proof that prior to the rape the prosecutrix had had sexual intercourse with him. An *in camera* hearing was held at which appellant testified concerning the incident. The lower court ruled that the testimony was relevant and admissible, and at trial, appellant repeated the testimony. The district attorney cross-examined appellant briefly concerning the date and time of the prior intercourse and

possible corroborating witnesses. In rebuttal, the Commonwealth recalled the prosecutrix, who denied having intercourse with appellant prior to the rape.* Thus, the Commonwealth's impeachment of appellant's testimony of prior sexual intercourse with the prosecutrix took an entirely predictable course. First, the district attorney explored on cross-examination the weaknesses of appellant's testimony. Second, the prosecutrix, on rebuttal, denied the incident. No unexpected cross-examination. No surprise witnesses. Appellant complains that the district attorney's cross-examination may have been sharper, and the prosecutrix's rebuttal better prepared, because of the Commonwealth's foreknowledge of his proposed testimony. Assuming that this was so, it did not, I think, confer the kind of advantage one would denominate "fundamentally unfair."

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*It appears from the reproduced record that the prosecutrix was the only witness called on rebuttal.

Denial of Appeal

SUPREME COURT OF PENNSYLVANIA
Eastern District

Sally Mrvos
Prothonotary
Catherine E. Lyden
Deputy Prothonotary

456 City Hall
Philadelphia, 19107
(215) 686-3581/84

March 31, 1980

RECEIVED
Apr 2 1980
Minney, Mecum
& Kohr

Samuel M. Mecum, Esq.
Minney, Mecum and Kohr
150 East Chestnut Street
Lancaster, Pa. 17602

Re: Commonwealth v. William Michael Strube, Petitioner No. 105 E.D. Misc. Docket 1980

Dear Mr. Mecum:

This is to advise you that on March 18, 1980, the Supreme Court entered its Order denying the Petition for Allowance of Appeal in the above-captioned matter.

Very truly yours,
Sally Mrvos
Prothonotary
By (s) Catherine E. Lyden
Catherine E. Lyden
Deputy Prothonotary

CEL: ejh
cc: Louise G. Herr, Esq.

Supreme Court, U. S.
FILED
OCT 6 1980
MICHAEL RODAK, JR., CLERK

No. 79-1984

In the Supreme Court of the United States

WILLIAM MICHAEL STRUBE,
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

JOSEPH C. MADENSPACHER,
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SUMMARY OF ARGUMENT

Pennsylvania's "rape shield" law, rather than being a discovery device, was intended as a form of protection of a rape victim's privacy. As such, it is not unconstitutional as violative of due process because it does not afford the Commonwealth an evidentiary advantage nor does it work to the detriment of petitioner. The Fifth Amendment is not violated by accelerating the timing of disclosure of elements of the defense. Petitioner's other claims were not raised in the trial court and have not been properly preserved for review.

ARGUMENT

Two (2) of the arguments advanced by petitioner have not been properly raised and preserved in the state courts below. Therefore, they may be considered to have been waived. *Argument* (1), found at pages 11-13 of the Petition for Writ of Certiorari, that there is no rational basis, nor necessity for the existence of Pennsylvania's "rape shield" law, 18 Pa. C.S. §3104, was not raised in the trial court. Nor was it raised in the Pennsylvania Superior Court. The issue appeared for the first time in petitioner's petition for allowance of appeal to the Pennsylvania Supreme Court. Under Pennsylvania law, failure to raise an issue in the trial court and to preserve it for review on direct appeal to the Superior Court constitutes a waiver thereof. *Commonwealth v. Blair,* 460 Pa. 31, 331 A.2d 213 (1975). Failure to present a federal question in conformance with state procedure is an adequate and independent ground barring review in the United States Supreme Court. *Henry v. Mississippi,* 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed. 2d 408 (1965).

Similarly, the argument set forth in part (3) (b) of the *argument* section of the Petition, pp. 11, 15, based upon *Brooks v. Tennessee,* 406 U.S. 605, 92 S.Ct. 1891, 32 L.Ed. 2d 358 (1972), was not raised or presented at all in the state court system. Federal constitutional issues not raised, preserved or passed upon in state courts below will not be considered in the United States Supreme Court. *Cardinale v. Louisiana,* 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed. 2d 398 (1969).

Argument

Petitioner argues that the act in question forces an accused to reveal his defense prior to trial, without requiring the Commonwealth to reveal its rebuttal, in violation of the due process clause of the Fourteenth Amendment; and violates the Fifth Amendment right to remain silent by requiring a written motion and offer of proof at the time of trial. With respect to the first part of the constitutional claim, as applied to this case, the statute merely required petitioner to present his evidence as to the victim's past sexual conduct with him "at the time of trial" so that the trial court could make findings as to its relevance and admissibility. 18 Pa. C.S. §3104(b). As such it was nothing more than a mere offer of proof. In this case, it was done after the case was attached for trial, but before a jury was empaneled and sworn. It consisted of the petitioner's testimony. The court asked him a few questions. He was not cross-examined. The court then ruled the evidence relevant and admissible. This procedure merely constituted an accelerated ruling on an issue arising during the trial.

Petitioner's argument is based upon analogy to *Wardius v. Oregon,* 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed. 2d 82 (1973), which held a notice-of-alibi statute unconstitutional as violative of due process because it did not provide for reciprocal discovery rights for the accused. Petitioner contends that the "rape shield" statute suffers from the same defect in that the Commonwealth is not required to divulge what evidence it will use to refute a defendant's evidence of past sexual conduct. In the case *sub judice,* the only evidence utilized by the Commonwealth was the testimony of the victim on rebuttal. The evil addressed in *Wardius* was the benefit accruing to the

state of non-reciprocal discovery rights. That evil is not present in 18 Pa. C.S. §3104, for the divulgence occurs "at the time of trial", not five (5) days beforehand as in *Wardius*. Thus the Commonwealth does not have time to prepare to offset this evidence, as is exemplified by the case at bar. Absolutely no benefit was obtained by the Commonwealth from petitioner's disclosure. Petitioner suffered no actual prejudice. The victim's denial and rebuttal was not made possible by the evidentiary hearing. Petitioner was not subjected to the hazard of surprise concerning refutation of his defense. He knew long before the trial that the victim would provide refutation evidence and had plently of opportunity to "discover" her.

There can be no doubt that the "rape shield" statute was not intended as a discovery device. Its effect is also unlike a discovery procedure, because the defense is not revealed until the time of trial. Under this statute, the motion, offer and in-camera hearing are required only before any evidence of past sexual conduct is presented. Hence the procedure need not be followed until after the Commonwealth has presented its case and rested. This, without a doubt, would not create a problem vis-a-vis reciprocity of discovery. Should the statute be interpreted to require the motion, offer and in-camera hearing at the commencement of the trial, as in the case at bar, no problem arises. The procedure is akin to a motion in limine, see Bailey and Rothblatt, *Successful Techniques For Criminal Trials*, §62.1 et seq.; Annot. 63 A.L.R. 3d 311 (1975), in that the court entertains an evidentiary ruling prior to the time when the evidence is actually offered. The defense is not put at any disadvantage because the Commonwealth has little or no extra time to prepare rebuttal evi-

dence, investigate witnesses, or explore weaknesses in stories. *Wardius* involved a procedural device designed to strengthen the State's case. With that in mind, the Supreme Court held "that in the absence of a strong showing of state interest to the contrary, discovery must be a two-way street". 37 L.Ed. 2d 88, 412 U.S. 475. The "rape shield" law is an expression of the Commonwealth's interest in protecting rape victims' right to privacy, which could be the compelling interest mentioned by the Supreme Court.

The statute does not violate an accused's privilege against self-incrimination. The same argument was raised as to a notice-of-alibi statute in *Williams v. Florida,* 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed. 2d 446 (1970). There it was held that the requirement to reveal his defense prior to trial merely compelled an accused to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information which he from the beginning planned to divulge at trial.

> Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself.

26 L.Ed. 2d p. 452, 399 U.S. p. 85.

As with the statute in *Williams v. Florida,* supra, the defense is not compelled by the statute involved here. The accused has a choice whether to present the defense or not, and he can deviate from the defense.

Argument

> The defendant in a criminal trial is frequently forced to testify himself and call other witnesses in an effort to reduce the risk of conviction. When he presents his witnesses, he must reveal their identity and submit them to cross-examination which in itself may prove incriminating or which may furnish the State with leads to incriminating rebuttal evidence. That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination.

399 U.S. 83, 84, 26 L.Ed. 2d 451. Cf. *Commonwealth v. Pritchett,* 225 Pa. Superior Ct. 401, 312 A.2d 434 (1973) (requiring defendant to indicate in some detail his possible defense does not violate the right to remain silent); *People v. Blackburn,* 56 Cal. App. 3d 685, 128 Cal. Rptr. 864 (1976) (California's version of "rape shield" law does not violate privilege against self-incrimination).

CONCLUSION

The Commonwealth of Pennsylvania submits that the issues presented by petitioner have not been properly preserved for review by Your Honorable Court or are not of the magnitude to warrant the issuance of a writ of certiorari. Therefore, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

Office of the District Attorney

BY: JOSEPH C. MADENSPACHER
Assistant District Attorney

BY: EDWARD F. BROWNE, JR.
Assistant District Attorney

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